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In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 587.

THE G. & P. AMUSEMENT COMPANY,
Petitioner,

vs.

REGENT THEATRE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF IN OPPOSITION OF RESPONDENTS, REGENT THEATRE COMPANY, CRANWOOD THEATRE COMPANY, CINEMA SERVICE CORP., EAST SHORE THEATRE COMPANY, PAUL GUSDANOVIC, COOPERATIVE THEATRES OF OHIO, INC., AND MILTON A. MOONEY.

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OPINIONS BELOW.

The opinion of the District Court is reported at 107 F. Supp. 453 and appears in Volume I of the record, page 143a. The opinion of the Court of Appeals for the Sixth Circuit is reported at 216 F. 2d 749 and appears in Appendix "D" of the petition and also in Volume I of the record, page 190a.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

I.

Did the respondents conspire to prefer the Regent Theatre over the Moreland Theatre in the distribution and licensing of motion pictures in the area in which those two theatres were located?

II.

Was the petitioner injured in its business or property as a result of any act or acts of the respondents alleged or claimed by the petitioner to have been in violation of the Anti-Trust Laws of the United States?

STATUTES INVOLVED.

The pertinent provisions of the Anti-Trust Act, 15 U. S. C., Sections 1, 2, 7 and 15, are set forth in the petition at pp. 2-4.

STATEMENT OF THE CASE.

Inasmuch as the decision in this case turned only on questions of fact and as a wholly inadequate and one-sided statement of the facts is made by petitioner, it is necessary for respondents to give the Court a more accurate and comprehensive statement of the facts.

This is an action for treble damages under the Anti-Trust Laws. Although brought technically by The G. & P. Amusement Company, a corporation, it is actually for the benefit of its present shareholders, Emanuel J. Stutz and his associates, who acquired all of its stock for $6,000.00 in February, 1948, about a year and a half before this suit was instituted (R. II, p. 169a). They also gave a note for $12,750.00 to reimburse the old shareholders for a $12,750.00 cash deposit owned by the petitioner and

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which was on deposit with the lessor of the Moreland Theatre (R. II, p. 463a). Within a period of a few weeks, the new shareholders, the real parties in interest here, had repaid themselves the entire $6,000.00 out of moneys advanced by the confectionery concessionaire at the Moreland Theatre (R. II, p. 172a).

Respondent, Paul Gusdanovic, has operated the Regent Theatre continuously since 1926 and has invested in it a sum in excess of $330,000.00. Stutz and his associates operating the Moreland for about two years without actual investment seek from the respondents the sum of $553,529.00 as claimed treble damages. This attempt to transform an investment of zero into a return of over one-half million dollars arises out of the fact that the Moreland and the Regent Theatres are located in the same neighborhood, a short distance from each other, and the petitioner claims that a portion of the motion picture feature films of the distributor-respondents which had been exhibited at the Regent should have been licensed for exhibition at the Moreland on a run ahead of the Regent.

The Moreland was erected about eight years after the Regent and was operated at the beginning by a group which included a large national circuit, Universal Pictures, Inc. The Moreland in its first year or two operated at a loss of about $500.00 a week although at that time it had as much first-run feature product as the Regent (R. II, p. 368a). Its operators then persuaded Gusdanovic to buy the lease from them (R. II, pp. 370a-371a). Gusdanovic at first showed good product at the Moreland but the grosses were so poor that they did not even pay for the film rental (R. II, p. 144a).

To cut down his losses, Gusdanovic for a time closed the theatre altogether (R. II, p. 299a) and finally after

surrendering a $20,000.00 cash deposit and the equipment and furnishings to his lessor, he secured a reduction in rent and opened the Moreland two days a week, nine months of the year. Both theatres are located in a Hungarian language neighborhood and Gusdanovic, to draw patronage to the Moreland, showed Hungarian language pictures there. This policy was continued by the petitioner throughout the period of about thirteen years during which it operated the Moreland until the theatre closed. The showing of Hungarian language pictures for a period of some twenty odd years typed the Moreland as a foreign language theatre.

Gusdanovic suffered large losses from the combined operation of the Moreland and Regent as the neighborhood could not support two theatres even with the savings from combined operation. Gusdanovic gave up the Moreland at the end of September, 1937, upon the expiration of his lease.

For the second time, the operation of the Moreland ended in failure and loss, both times before the respondent, Cooperative Theatres of Ohio, Inc., was in existence. In July, 1937, petitioner was incorporated to take over the operation of the Moreland upon the expiration of Gusdanovic's lease at the end of September, 1937. Its organizers were connected with an important local circuit of theatres known as Community Circuit.

The history of the two theatres showed that the Regent in its appointments and facilities kept pace with the times whereas the Moreland retrogressed. In the period subsequent to October, 1937, Gusdanovic continued to expend large sums of money in modernizing and keeping the Regent as a first-class neighborhood theatre. In 1940, he completely remodeled, refurnished and modernized the Regent (R. II, pp. 301a-302a, 336a-337a, 340a-341a). Ad-

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ditional major improvements were made in the years following 1940 (R. II, pp. 302a-303a). In 1946, a complete air-conditioning and refrigeration system of the most modern type was installed in the Regent (R. II, p. 417a). During the period since 1940, a sum in excess of $55,000.00 was spent in making these improvements to the Regent.

In contrast, petitioner, when it took over the Moreland in 1937, installed a sound system and did some painting at a total cost of $6,300.00 and thereafter from 1938 until the theatre closed in 1950 expended less than $1,700.00 for modernization and improvements. The Moreland at no time had an air-conditioning or refrigerating system and throughout the entire period continued to have substantially only the original equipment put in when it was constructed at the end of 1927. When Stutz and his associates acquired all of the shares of petitioner in 1948, it would have taken between $75,000.00 and $100,000.00 to bring the Moreland up to the physical condition in which the Regent was at that time (R. II, pp. 344a, 356a). Notwithstanding the marked physical inferiority of the Moreland, the petitioner expended a total sum of $246.81 during the entire period from February, 1948, to March, 1950, for improvements to the Moreland.

At least since 1940, the Moreland has not been competitive with the Regent from the point of view of physical equipment, appointments, comfort and attractiveness to theatre-goers. In the opinion of expert motion picture exhibitors who testified at the trial, the Moreland's lack of competitiveness with the Regent in these respects was so serious that the Moreland could not be operated successfully (R. II, pp. 345a, 356a, 361a-364a) even if all the product of the distributors were equally divided between the two theatres (R. II, pp. 376a-378a).

The already difficult situation of the Regent and the Moreland in the neighborhood was worsened when shortly after petitioner took over the Moreland in 1937, a large, modern, well-located theatre with extensive parking lot facilities for its patrons, which latter were wholly lacking by both the Moreland and the Regent, opened about one-half mile from the Regent and the Moreland.

Even with the extensive improvements made to the Regent, it operated at a loss each year since 1940 with the exception of the years 1945, 1946 and 1947 which were outstanding years in the history of the motion picture industry.

The Court found that the neighborhood in which the Regent and the Moreland were located was not large enough to support two theatres of that size in close proximity to each other, a condition which prevailed in all neighborhoods in the Cleveland area practically without exception. This was testified to by two outstanding disinterested motion picture exhibitors in the Cleveland area, Fine and Essick, as well as by Mooney (R. I, p. 21a; R. II, pp. 97a, 358a-359a, 368a-369a, 371a-374a, 379a).

In 1938, Gusdanovic became too ill to perform any longer the arduous work of buying and booking film and to spend the large amount of time and effort required at film exchanges. By employing respondent, Cooperative Theatres of Ohio, Inc., to perform this service, he was thus enabled to continue his business within the limitations of his health (R. I, p. 101a).

Respondent, Cooperative Theatres of Ohio, Inc., is not a cooperative enterprise as the name might imply, nor is it a "combine" as petitioner seeks to mislabel it. It is merely a service agency owned entirely by respondent, Milton A. Mooney, and members of his family. For a small fixed fee, it performs the service of renting and booking

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films for independent theatre exhibitors who employ it. None of the exhibitors for whom Cooperative Theatres of Ohio, Inc., hereinafter called "Cooperative," performed these services ever owned any shares of Cooperative or were ever officers or directors of Cooperative. None of the exhibitors had any interest of any kind in any earnings of Cooperative nor did Cooperative have any interest in any of the earnings of the exhibitors who employed it. None of the exhibitors who employed Cooperative had any interest in any of the earnings or operations of any other exhibitor who employed Cooperative. Every exhibitor was completely independent of Cooperative and of all other exhibitors who employed Cooperative (R. II, pp. 93a-94a, 95a). No exhibitor would permit Cooperative to forego an advantage for his theatre or to put him at a disadvantage in order to further the cause of some other theatre for which Cooperative was buying (R. II, pp. 303a, 311a, 323a). The assertion made by the petitioner in the petition (page 23) that an independent exhibitor who employed Cooperative would so permit his theatre to be used is pure conjecture on the part of the petitioner and is not only without foundation in the record but is directly contrary to all the evidence in the record on that matter.

Except in a few instances in the first year or two of its existence, there was no written contract between Cooperative and any of the exhibitors who employed it. The exhibitors could and did terminate their employment of Cooperative at will and without the imposition of any penalty of any kind (R. II, pp. 306a-307a). The impression which petitioner seeks to give that the exhibitor lost all control over the right to contract for his film by quoting from a contract which was used only in a few instances in the first year or two is entirely misleading. On occasions when a distributor was unable to reach what it considered satis-

factory terms with Cooperative, it would go directly to the exhibitors whom Cooperative represented and deal with them (R. II, pp. 50a-51a). Each exhibitor had the right to and in many instances did direct Cooperative as to what films it should and should not buy for that exhibitor's theatre (R. I, p. 13a).

Cooperative made it possible for each exhibitor who employed it to exhibit films in his theatre chosen on the basis of expert knowledge and adequate time devoted to negotiation with distributors. The buying of film by exhibitors is long drawn out, sharply contested and time consuming. Very often tempers flare and strong language is used. This occurs in the course of negotiations with most exhibitors (R. II, pp. 72a, 76a, 131a). Prudent buying of film depends upon thorough knowledge of the probable value of a picture in a particular theatre based upon screening of the features offered and checking on their box office history in comparable situations, services which were rendered by Cooperative (R. II, pp. 308a, 324a-325a). Cooperative also arranged for advertising, trailers, posters and delivery of the films (R. II, p. 307a). It was able to and did properly match and balance two features into an attractive double feature program (R. II, p. 325a).

For all of these services, Cooperative charged each theatre a small weekly flat fee ranging at first from $7.50 to $20.00 and latterly from $17.50 to $25.00 (R. II, pp. 94a-95a). The number of theatres employing the services of Cooperative varied from time to time. When the motion picture business began to decline rapidly in 1949 and 1950, Cooperative lost many of its accounts. Conventional theatres employing Cooperative fell from a peak of 105 to 71 at the time of the trial of this action (R. II, p. 310a).

The petitioner itself employed Cooperative for a time in 1948 to buy and book film for it in the same manner as

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Cooperative did for the other exhibitors who employed it. After several months, petitioner terminated the services of Cooperative but immediately employed another buying and booking agency performing the same kind of services as Cooperative and continued to employ such buying and booking agency until the Moreland closed in March, 1950 (R. II, pp. 175a-176a).

The negotiations between Cooperative and the distributors for pictures were on a theatre-by-theatre and picture-by-picture basis. At the outset of the meetings between the parties, the price to be paid for the particular picture by the first theatre on the list would be discussed. Into this discussion would enter a number of factors including the size, location and type of theatre, the type of picture involved, its prior box office history, its grossing possibilities at the individual theatre and the availability date. The testimony and exhibits show a process of bargaining back and forth which resulted in working out rentals for some theatres for some pictures and not for others. When an agreement had been reached for a particular picture for the first theatre on the list, the parties would then take up the second theatre and the process would be repeated until they had covered each theatre which desired to exhibit the picture and had completed the negotiations for each one. Some of the theatres on the list would not buy the picture or pictures under negotiation for a variety of reasons. In some instances, the picture was not deemed suitable by Cooperative for a particular theatre and in still other instances, the price for a particular picture at a particular theatre could not be agreed upon between the parties (R. I, pp. 11a-12a, 80a, 101a-102a; R. II, pp. 67a-70a, 111a-113a, 127a-128a, 384a-385a, 400a-401a, 413a-415a, 446a). The evidence in the record supports the findings of fact made by the District

Court in its findings Nos. 43-48, inclusive, relating to these matters (R. I, pp. 172a-173a).

Both the Regent and the Moreland during most of the period involved here had a policy of three changes of program a week. Almost continuously during this period, on one of these changes, for two days each week, the Moreland played Hungarian language pictures. On the other two changes, it played English language pictures. The Regent played English language pictures on all three changes that it made each week. On their English language changes, both theatres, throughout practically all of the period charged, played double features.

Each theatre played product first-run in the neighborhood of some of the eight major distributors. The Moreland played first-run in the neighborhood and ahead of the Regent all of the product of Paramount, one-half of the product of RKO, one-half of Columbia, one-half of United Artists, all of Disney Productions, all of Goldwyn Productions, the product of the latter two being released through major distributors, and from the latter part of 1946 most of the product of Loew's (R. I, pp. 94a-95a; R. II, pp. 158a-159a, 322a-323a). Each theatre on the product which it played first-run in the neighborhood had a clearance of only seven days over the other theatre.

Both the Moreland and the Regent, in addition to exhibiting the films of major distributors, also exhibited the films of various of the so-called independent distributors.

The Hungarian language pictures at the Moreland consistently outgrossed the first-run product of the major distributors shown at the Moreland (R. II, pp. 441a-443a, 456a-457a).

Each of the distributor-respondents had many situations in which it sold its product to opposition houses of

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exhibitors employing Cooperative (R. II, pp. 80a-93a). A number of them from time to time sold away from the Regent to the Moreland. Fox did on occasions when the Regent refused to meet its price demands (R. II, pp. 215a-217a); Universal did when it decided to find out the potential grossing power of the Moreland (R. I, pp. 114a-116a; R. II, pp. 246a-247a); Warner did when it sold pictures to the Moreland when the Regent did not meet its terms (R. II, pp. 221a-223a, 234a-235a). Loew's, in 1946, made the Regent the object of its first experiment in competitive bidding in the entire Cleveland exchange area, and of the many situations where it might have tested out competitive bidding, chose the Regent-Moreland situation although the Regent had been its customer for upwards of twenty years at the time and although Cooperative was the buying agent for the Regent (R. II, pp. 130a-131a, 275a-277a). Petitioner blandly asserts that when Loew's did this, Cooperative stopped buying Loew's product for all of the theatres it was representing. The evidence shows the contrary. Cooperative stopped buying only for Gusdanovic on his express directions but continued to buy Loew's for the other exhibitors it represented as shown by the summary of the cut-off sheets introduced in evidence. The other theatres would not have countenanced giving up Loew's because of a dispute between the Regent and Loew's (R. II, pp. 312a-313a).

During the years 1949 and 1950, the motion picture industry experienced the greatest slump in its history. Many theatres throughout the nation and throughout the Cleveland area were compelled by lack of business to close their doors including many of the theatres employing Cooperative (R. I, p. 179a, Finding 76; R. II, pp. 147a, 309a-310a, 375a).

ARGUMENT.

The petitioner in its argument seeks to give the impression that the courts below have held that a common buying agent because it does not own the theatres which it represents is not subject to the Anti-Trust Acts. Nothing could be further from the fact. What the courts below held was that the evidence in this case did not show that the respondents had in any way violated the Anti-Trust Acts. The District Court, whose opinion was adopted by the Court of Appeals, stated:

> "There is no dispute that, if the evidence even though purely circumstantial should disclose the existence of a monopoly power and the wrongful use of that power, this Court would be duty-bound to award such damages as are proved." (R. I, p. 152a.)

Again at R. I, p. 158a, the District Court held:

> "This Court is firmly convinced that there is complete and utter failure of proof, that the alleged monopoly buying power and conspiracy ever existed."

The fact that there was no common ownership of the theatres which employed Cooperative in this case was only one matter of evidence which the Court considered. Upon a consideration of all of the evidence before it, the District Court found that there had been no conspiracy and no monopoly.

If there is anything in the record which is clearly beyond question and substantiated over and over by the testimony and exhibits, it is that the negotiations between Cooperative and each of the distributor-respondents were separate as to each theatre and as to each picture, that is, theatre-by-theatre and picture-by-picture. As against this evidence, petitioner relies merely upon innuendo of blanket dealing from the fact that Cooperative represented a number of theatres and carried on negotiations for some of them

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at the same meetings, and that in some cases the contracts for each individual theatre and each individual picture were placed for convenience in one instrument. As was held by the District Court:

> "The frivolity of requiring Mooney to negotiate by means of a separate deal sheet and in a separate sitting for each of his clients is too obvious to require an extended explanation." (R. I, p. 157a.)

This whole course of theatre-by-theatre and picture-by-picture dealing is overwhelmingly supported by the record (R. I, pp. 12a, 80a, 101a-102a; R. II, pp. 67a-70a, 111a-113a, 128a, 384a-385a, 400a-401a, 413a, 414a-415a, 446a).

On the basis of the evidence, the Court found in Finding No. 43:

> "The negotiations between Cooperative and Mooney on behalf of the exhibitors Cooperative represented and each of the distributor defendants were on a basis of theatre-by-theatre, and after each distributor ceased selling on a season basis, picture-by-picture. This was so whether or not individual contracts for each theatre were embodied in one document or in separate documents." (R. I, p. 172a.)

It is immaterial whether the evidence of the bargaining was set forth on one piece of paper or on ten pieces of paper. The individual character of the negotiations not the form in which they were recorded is the test of their lawfulness.

Petitioner on page 11 of the petition in referring to the testimony of Zucker does not give the testimony of the witness as to why Universal sold to the Regent. Zucker testified:

> "A. I sold to the Regent Theater because the Regent Theater had been a customer of Universal Pic-

tures for some considerable period of time prior to my employment by Universal Pictures.

Q. Was that also the reason why you never considered selling to the Moreland? A. That would be one of the reasons. I had no knowledge of my own that Moreland Theater desired to buy Universal pictures." (R. II, p. 99a.)

At page 8 of the petition, petitioner quotes an alleged statement that Mooney told Schmertz, the Fox branch manager, that he did not dare sell any of the opposition houses. Mooney emphatically denied making this statement to Schmertz or anyone else (R. II, pp. 311a-312a). It is in evidence that a branch manager sometimes made reports, quite humanly and understandably, as to statements supposedly made by an exhibitor in order to relieve the heavy pressure of the home office on himself (R. II, pp. 231a-232a, 405a). The point of the matter is that the trial court, upon the evidence before it, believed Mooney's testimony that he had not made such a statement. The Court found:

"None of the distributor defendants was intimidated or coerced in their actions in the Regent-Moreland situation by any of the other defendants." (R. I, p. 180a, Finding 86.)

Cooperative was not a "combine" as it is sought to be labeled by petitioner in its brief. Cooperative being merely an employee of many individual exhibitors could not use the theatres of some exhibitors as a lever to obtain advantages for other exhibitors. Each of the exhibitors employing Cooperative was interested only in his own theatre and in obtaining the best deal that he could for his own theatre. He was completely uninterested in and had no stake whatever in what kind of a deal was made for some other theatre which also was employing Coopera-

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tive to do its buying. No exhibitor employing Cooperative would have permitted Cooperative to use his theatre and put his theatre at a disadvantage even temporarily in order to obtain some advantage for another theatre in which that exhibitor had no interest (R. II, p. 303a). Cooperative had no power whatever to compel any exhibitor who employed it to forego the showing of any picture in order to help another exhibitor. Any exhibitor could dispense with the services of Cooperative at any time he chose. Mooney clearly stated that if he had tried to disadvantage one of his exhibitor accounts to gain an advantage for another one of his exhibitor accounts, he would soon have been out of business (R. II, pp. 311a, 323a).

In the *Paramount, Schine* and *Griffith* cases, the reason for enjoining the defendants there from either using a buying agency or from buying for theatres which were not owned by them was because the defendants in those cases had been found to have engaged generally in a conspiracy in violation of the Anti-Trust Acts and this was a means adopted, among others, to prevent a recurrence of the illegal actions of the defendants in those specific cases. They do not hold, however, that a buying agent who represents a number of independent exhibitors is *ipso facto* in violation of the Anti-Trust Laws.

There is nothing unlawful in an exhibitor seeking to retain the product which he has. The law merely forbids the use of unlawful means to accomplish this lawful purpose. *Windsor Theatre Company vs. Walbrook,* 189 F. 2d 797. There is no proof whatever in the record that Cooperative ever engaged in any unlawful activity in order to attempt to retain for the Regent the product which it had when Cooperative took over the buying for the Regent. In fact, a large part of this product was lost to the Regent after Cooperative became its buying agent (R. II, pp. 10a,

105a-106a, 130a-131a, 275a-277a). The District Court's findings were:

> "78. Neither Mooney nor Cooperative used the closed or noncompetitive situations which Cooperative represented as a means of obtaining any product for the Regent or any advantage or privilege for the Regent over the Moreland from the distributor defendants or any of them."
>
> "79. Each of the distributor defendants in choosing the Regent as its prior run customer rather than the Moreland did so on the merits of the Regent and without regard to the fact that Cooperative was employed to buy and book pictures for the Regent." (R. I, pp. 179a-180a.)

In decided contrast with the method of negotiation for product carried on by Cooperative, are the so-called master agreements or bushel basket deals which were the vice in the cases decided by this Court and which petitioner cites. There is a vast amount of difference between the master agreements contained in *United States v. Paramount,* 334 U. S. 131, 85 F. Supp. 881, and the type of negotiation carried on by Cooperative with each of the distributors. In *Paramount,* the Court found that master agreements had been entered into between the defendants which allowed a circuit to allocate the film rental paid among its theatres as it saw fit and also to exhibit the features upon such playing time as it deemed best and left other terms to the circuit's discretion. It is this type of agreement which was found to be in restraint of trade. At no time did Cooperative have any right to allocate the film rentals among the various theatres for which it bought product and at no time did it have the right to exhibit the features on playing time as it deemed best. In every case, the actual film rental or the percentage rental figure of each film for each theatre was determined in advance by contract and

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the individual availability date for each theatre appeared upon each theatre's contract. Cooperative was in no position to manipulate the film rentals or the playing dates as between different exhibitors whom it represented.

The attempt of the petitioner to equate Cooperative with the circuits in Paramount and similar Government-instituted injunction actions by constantly referring to it as a "circuit" is without factual basis. Cooperative is not a circuit in the sense of theatres which are united in ownership and interest and responsive to a single will. Such unity of ownership can sacrifice the interest of some theatres for the benefit of others, something which Cooperative could not do; but even if Cooperative could be designated as a circuit, there is nothing in any of the cases which holds that a circuit is unlawful *per se*. In fact, in *Paramount*, 334 U. S. 131, circuits were provided for under the decree of the Court, some of them embracing large numbers of theatres. Likewise in *Schine*, *Griffith* and *Crescent*, circuits were recognized as lawful instrumentalities, although certain vices in the operation of those particular circuits, especially where there were affiliated ownerships between exhibitors and distributors, were eliminated. Nevertheless, in all of these cases, circuits as such were not forbidden and their right to continued existence was recognized.

Buying power is not unlawful *per se*. As was held by this Court in *Griffith*, 334 U. S. 100, 108:

> "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer."

It becomes unlawful only when it is exercised in unreasonable restraint of trade.

The decision of the Courts below in the case at bar is not in conflict with the decisions of this Court cited in the

petition. In *Paramount*, 334 U. S. 131, this Court dealt with price fixing, unreasonable clearances, illegal pooling agreements and joint ownerships, none of which are involved in this case. The Court also dealt with certain types of formula deals, master agreements and franchises which are not in issue here. In formula deals, the license fee for a picture was measured by a certain percentage of the national gross and the circuit was also allowed to allocate playing time and film rentals among the various theatres as it saw fit with no fixed price for each theatre of the circuit, a tremendous competitive advantage. There are no formula deals in this case.

We have already discussed master agreements which likewise embodied the features of one aggregate price for all of the theatres of a circuit, and permitted the circuit to allocate the film rentals among its theatres as it saw fit and to shuffle playing times in the circuit's discretion, all to the great advantage of the circuit. There are no such agreements in this case.

Franchises likewise are not involved in this case. This Court also struck down block booking. This practice went out long ago and is not in issue in this case. This Court also condemned various contract discriminations contained in the contracts with the big circuits. These discriminations were the result of the inclusion of provisions in contracts with the major circuits which were not included in the standard contracts of the distributors. The only contracts made in the case at bar by the distributors in licensing films to theatres serviced by Cooperative were the standard contracts used by the distributor with all individual independent exhibitors, with no different or discriminatory clauses.

While the District Court in *Paramount* had provided in its decree for competitive bidding, this Court eliminated that feature.

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In *Crescent*, 323 U. S. 173, the Court was dealing with a circuit of commonly-owned and controlled theatres with a single-minded purpose bent upon creating a circuit empire. The defendants in *Crescent* would force a competitor to sell out to them by intimidating the distributor so as not to renew his contracts for films, and the competitor frequently then came to terms and signed an agreement not to compete. In addition, agreements not to compete extended far beyond the protection of the business sold and demonstrated a clear intention to monopolize theatre operation wherever those defendants gained a foothold. There were franchise agreements of such a nature that a second run after defendants' theatres was virtually eliminated. We have no such factual situation in this case nor anything which remotely resembles it.

In *Griffith*, 334 U. S. 100, there was likewise a suit against a powerful circuit of commonly-owned and controlled companies. They were not independent of each other as the petitioner seeks to imply (petition, page 24). This Court held, 334 U. S. 100, 101:

> "The appellees are four affiliated corporations and two individuals who are associated with them as stockholders and officers."

Here, again, master agreements similar to those in *Paramount* were executed, with the right of the circuit at its whim and for its own purposes to allocate film rentals, playing times and other terms among its various theatres, so that it could manipulate the use of the product against competitors at will. This Court held that large-scale buying power is not unlawful per se and that it might yield price or other lawful advantages to the buyer, but that the use of the kind of blanket agreements there involved was unlawful. Since we have no such agreements here, the language used by the Court in striking down the practices in that case is wholly inapplicable to the case at bar.

In *Schine*, 334 U. S. 110, the defendant-exhibitor comprised a powerful aggregation of theatres chiefly owned and completely controlled by the Schine interests. The District Court made specific findings as to the predatory means used by Schine in stifling competition. Schine insisted that distributors refrain from selling certain independent competitors any pictures on any run whatever and the distributors agreed to this; Schine obtained unreasonable clearances year after year in many towns, in some instances of as much as 120 days where no clearance had existed before; Schine forced competitors to give up their leases by threatening to build in opposition and taking other action designed to intimidate them; Schine consistently erected new theatres wherever an independent started construction in order to drive him out of business; Schine forced independents to sell out to it under threats to build unless they did so; Schine threatened to build an opposition theatre and to undercut it with a ruinous admission price policy if the independent went ahead with the plans to build; Schine made franchise agreements for periods of two or three years at special film rentals not given independents and in at least one case, the agreement was made to cover subsequently acquired theatres.

There is not one shred of evidence in the record that Cooperative or any of the respondents in this case did any of the things which this Court struck down in the cases we have just referred to. Petitioner is wholly unwarranted in its attempt to use certain phrases culled from the opinions of those cases as applicable here where the factual situation is entirely different.

In cases recently decided, various United States Courts of Appeals and United States District Courts have refused to adopt the sort of generalization which petitioner

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seeks to use here and have refused to render judgment against defendants where plaintiffs have merely used phrases by rote, unsubstantiated by proof of unlawful restraints. This has been supported by this Court by its decision in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation,* 346 U. S. 537. This Court also denied certiorari in *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.,* 342 U. S. 926 and *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.* (January 10, 1955), ___ U. S. ___, 99 L. ed. Advance p. 207.

A recent case in point is *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.,* 86 F. Supp. 716, affirmed by the Court of Appeals in 190 F. 2d 951, certiorari denied, 342 U. S. 926. That case was a much stronger case for the plaintiff there than the case at bar, because the defendant-exhibitors were the so-called Shea group, a circuit controlled and largely owned by Paramount and Loew's. In that case, as in this case, the defendants had operated a theatre, which the plaintiff later acquired after defendants had lost money in it and had surrendered the lease. In that case, the plaintiff complained of an alleged buying power used to restrain competition and of various alleged discriminatory practices. Judge Knight, who had decided the *Schine* case against the defendants therein, had no difficulty in finding for the defendants in the *Dipson* case. The Court weighed the facts of that case and found no analogy to the *Paramount, Schine* and similar cases. The Court found that each of the distributor-defendants had exercised its right to select its own customer. It is further significant that this case was affirmed by the Court of Appeals for the Second Circuit in an opinion written by Judge Augustus N. Hand, who was the same judge who had written the opinion for the three-judge statutory court in the *Paramount* case in which judgment had been rendered against

some of the same distributor-defendants. This Court denied certiorari in 342 U. S. 926.

Also *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, affirmed in 189 F. 2d 797; *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 215 F. 2d 167, certiorari denied January 10, 1955, ___ U. S. ___, 99 L. ed. Advance p. 207, and *Westway Theatre, Inc. v. 20th Century Fox Film Corp.*, 30 F. Supp., 830, affirmed 113 F. 2d 932, conclusively demonstrate that the courts have not abandoned the requirement of evidence to support a charge of wrongdoing.

The distributors of film product are engaged in a private enterprise. They are not public utilities which must sell their product to all who ask for it. Each distributor has the right to decide with whom it will deal and to determine for itself what in its judgment will best serve its business interests so long as it does not act contrary to law. *Lorain Journal Co. v. United States*, 342 U. S. 143; *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, 86 F. Supp. 716, 725, affirmed 190 F. 2d 951, certiorari denied 342 U. S. 926; *Windsor Theatre Co. v. Walbrook Amusement Co.*, 189 F. 2d 797, 798; *Westway Theatre, Inc. v. 20th Century Fox Film Corp.*, 30 F. Supp. 830, 836, affirmed 113 F. 2d 932.

That the Regent was an old and satisfactory customer of each of the distributor-respondents is uncontroverted (R. I, pp. 62a, 112a-113a; R. II, pp. 77a, 130a, 223a-224a, 249a-250a). It is also uncontroverted that each of the distributor-respondents pursued the sound business policy of trying to retain and continue relations with exhibitors with whom it had had a history of satisfactory dealing in the past. The continuation of this policy and the reasonableness of continuing to deal with the Regent is not to be judged by the experience which the Moreland may have

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had in grossing on an outstanding picture or two here and there during its history. Business judgment and business policy are entitled to be based upon the day-in and day-out operations and experience of the exhibitor in conducting a successful motion picture theatre.

As was stated by the Court in *Windsor Theatre Co. v. Walbrook Amusement Co.*, 94 F. Supp. 388, 396, affirmed by the Court of Appeals at 189 F. 2d 797:

> "Two theatres directly across the street from each other were in active competition. Each distributor had to do business with one or the other on first availability of pictures in the zone. Some of the eight major distributors preferred to do business with the plaintiff, but the majority preferred to continue their long previously satisfactory business with the defendants. In doing so they exercised what I understand still to be clearly their undoubted and important right to select their customers."

In *Dipson Theatres, Inc. v. Buffalo Theatres,* 190 F. 2d 951, 956, certiorari denied 342 U. S. 926, it was stated:

> "In the light of the foregoing a conspiracy was not established because some of the distributors, when forced to choose between the Bailey and the Kensington, decided that they would gross more at once and in the long run by showing all their pictures at the Kensington first, thus continuing the established trend toward that theatre."

Continuity of place of exhibition as well as continuity of business dealings are a self-evident advantage not only to the distributor and to the exhibitor, but also to the public served by them both. *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 92, affirmed by the Court of Appeals 215 F. 2d 167, certiorari denied January 10, 1955, ____ U. S. ____, 99 L. ed. Advance p. 207.

The District Court in the case at bar followed the law as enunciated by this Court. As the District Court stated:

> "The real controversy in this case is factual rather than legal in nature, and the existence or non-existence of an unlawful conspiracy and the extent to which it produced the alleged damages must be resolved on the basis of the facts adduced." (R. I, p. 146a.)

On the basis of the facts adduced, the District Court sitting as a jury and having heard all of the evidence found that the petitioner had failed to sustain the allegations of its complaint and that there was in fact no conspiracy nor any monopoly. This is analogous to the situation decided by this Court in *Theatre Enterprises, Inc., v. Paramount Film Distributing Corporation,* 346 U. S. 537 where this Court held:

> "Here each of the respondents has denied the existence of any collaboration and in addition had introduced evidence of the local conditions surrounding the Crest operation which, they contended, precluded it from being a successful first-run house * * *. This evidence, together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury."

In the case at bar, the respondents denied the existence of any conspiracy and the existence of any monopoly power and in addition there was positive evidence introduced concerning the local conditions which were responsible for the lack of success of the Moreland and the reasons why the distributor-respondents continued to license their product to the Regent on a run ahead of the Moreland. Among this great mass of evidence was the fact that the Moreland was inferior to the Regent in its appointments, facilities, attractiveness and comfort to patrons throughout at least the period since 1940 and this was so

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found by the Court in Finding No. 73 (R. I, p. 178a). The fact that two theatres such as the Moreland and Regent could not be operated successfully in the same neighborhood in close proximity to each other, was the usual experience of most of the neighborhoods in the Greater Cleveland area almost without exception (R. I, p. 21a; R. II, pp. 97a, 358a-359a, 368a-369a, 371a-374a, 379a). On the basis of the evidence, the Court found that the neighborhood was not large enough to support two theatres of the size of the Regent and the Moreland from the time the Moreland was built in 1927 (Finding No. 77, R. I, p. 179a).

Throughout its entire existence, the Moreland was typed as an operation without a steady policy, closed completely for long periods of time, at other periods opened only part time and used for many purposes other than the exhibition of English language pictures. Throughout practically its entire history, the Moreland had the policy of showing foreign language pictures on at least two days a week. This typed it as a foreign language theatre as contrasted to a theatre showing English language films. The Moreland from its inception was a losing proposition even when it was operated under the aegis of Universal, one of the major picture companies (R. II, pp. 368a, 370a). As the District Court stated in its opinion:

> "From the time of its original opening, the Moreland distinguished itself by nothing but a marked inability to attract patronage." (R. I, p. 158a.)

In 1949 and 1950, one of the worst periods in the entire history of the motion picture industry set in. Many theatres throughout the nation and throughout the Cleveland area were compelled by lack of business to close their doors, including a theatre operated by respondent Gusdanovic and many theatres which employed Cooperative (R. II, pp. 147a, 309a-310a, 375a). This period of wide-

spread closing of motion picture theatres was found as a fact on the evidence by the District Court in Finding No. 76 (R. I, p. 179a).

Upon all of the evidence, the District Court sitting as a jury found that there had been no conspiracy and no monopoly (Findings Nos. 80, 81, 82, 83, 85, R. I, p. 180a).

CONCLUSION.

The decision of the District Court is based upon the evidence adduced at the trial and is in entire accord with the applicable decisions of this Court. The only questions in this case were factual ones. No important question of law is in controversy.

We submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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